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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

B5

DATE: APR 20 2011 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]
LIN 09 024 52018

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks to classify the beneficiary pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability in the sciences. The petitioner is a medical manufacturing company that seeks to employ the beneficiary as a geodesist. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the beneficiary qualifies for classification as an alien of exceptional ability in the sciences, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits two witness letters.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner filed the Form I-140 petition on November 4, 2008. The AAO notes that the exact nature of the beneficiary's intended occupation is not entirely clear. On the petition form, the petitioner provided the following information about the beneficiary's intended position:

> Job Title: Surveyors SOC Code: 17-102
>
> Nontechnical Description of Job: Make measurements and determine property boundaries. Provide data relevant to the shape, contour, gravitation, location, elevation,

> or dimension of land or land [*sic*] or land features on or near the earth's surface for engineering, mapmaking[,] mining, land evaluation, construction, and other purposes.

The Bureau of Labor Standards (BLS) Standard Occupational Classification (SOC) code for surveyors is 17-1022 (all SOC codes have six digits). The job description on Form I-140 quoted verbatim (with some transcription errors) from the BLS web site at http://www.bls.gov/soc/2010/soc171022.htm (printout added to record April 5, 2010).

After calling the beneficiary a "surveyor" on Form I-140, and quoting the corresponding SOC code and job description used by the BLS, in accompanying letters both the petitioner and counsel refer to the beneficiary as a "geodesist." The terms "surveyor" and "geodesist" are related but not interchangeable. The BLS classifies geodesists as "geoscientists" under SOC code 19-2042, with the following job description:

> Study the composition, structure, and other physical aspects of the Earth. May use geological, physics, and mathematics knowledge in exploration for oil, gas, minerals, or underground water; or in waste disposal, land reclamation, or other environmental problems. May study the Earth's internal composition, atmospheres, oceans, and its magnetic, electrical, and gravitational forces. Includes mineralogists, crystallographers, paleontologists, stratigraphers, geodesists, and seismologists.

(Source: http://www.bls.gov/soc/2010/soc192042.htm, printout added to record April 5, 2010.)

[redacted] president of the petitioning entity, stated: "The closest job description that could be found in the Dictionary of Occupational Titles was [redacted]. A copy of that job description is attached." The petitioner did not, in fact, attach a copy of the job description, and [redacted] did not identify the job title that accompanied the above description. The now-obsolete *Dictionary of Occupational Titles* applied the above designations to a number of occupations, including geodesy, within the larger category of geology.

The director found that the beneficiary qualifies for classification as an alien of exceptional ability in the sciences. The AAO will not disturb this finding. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Commr. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The AAO also notes that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability.

The regulation at 8 C.F.R. § 204.5(k)(4)(ii) requires that a petitioner seeking to apply for the exemption must submit Form ETA-750B, Statement of Qualifications of Alien (or corresponding sections of ETA Form 9089), in duplicate. The record does not contain this required document, and therefore the petitioner has not properly applied for the national interest waiver. The director, however, did not raise this issue. The AAO will, therefore, review the matter on the merits rather than leave it at a finding that the petitioner did not properly apply for the waiver.

In his introductory letter, [redacted] stated:

> [The petitioner] has recently entered into agreements with a Russian company (that used to produce nuclear weapons) that will provide extensive exchange of nuclear scientists and important energy inventions between the two countries. The State [D]epartment and Department of Energy are most anxious to assist the parties in making these projects successful. This U.S. & Russian Joint Venture will provide 2,500 jobs in the United States with new assembly plants in New Mexico and California.

Because both American and Russian companies and employees are going to be involved in this joint venture, the company must be certain that its engineering practices conform to the laws of both countries. This means that [the petitioner] must have someone on its staff that is thoroughly familiar with Geodesist engineering practices in Russia.

This is the primary reason [the petitioner] wants to hire the beneficiary. Her primary responsibility will be to act as a Geodesist for ZAO Numotech-Spektr LLC. This Company is controlled 75% by [the petitioner] and will be based in Russia where the company['s] products will be developed and manufactured.

The Geodesist will setup and supervise the Geodesist systems of both companies. She will establish company engineering procedures.

The Geodesist will use her training and experience to develop statistical methods to evaluate construction of ZAO Numotech-Spectr [*sic*] LLC. She will assist management in setting company construction objectives and will then regularly prepare and present engineering reports regarding the joint venture's engineering position. She will use her experience in pricing analysis to help the company President decide which projects offer the greatest way to design the ZAO Numotech-Spektr manufacturing plant. The Geodesist will setup and supervise the Geodesist systems of both companies. She will establish company engineering procedures.

The Geodesist will be responsible [for] surveying and geodetic instruments . . . in setting up and improving network of triangulation over the soil of the manufacturing plant's surface, in order to provide fixed points for use in making maps [and] planning and compliance with laws of both United States and Russia[]. . . . She will determine and evaluate proposals to maximize the company's protection against risk of building failures and establishing bench marks (known points of elevation). So that engineering gravimetric surveying will determine variations in, and provides data used in determination of the construction of ZAO Numotech-Spektr plant.

. . . [T]he Geodesist must also be fluent in Russian, have experience in Russia, be able and willing to travel between the two countries as needed, and ha[ve] received security clearances from the governments of both Russia[] and [the] United States.

[The beneficiary] is very well qualified for this job. Of great importance to our offer to her is the fact that she will been [*sic*] granted a security clearance by the United States government to enter such high security areas as Sandia National Laboratories and similar defense research establishments. She has extensive knowledge of the inner workings of the Russian[] engineering methods and procedures.

The petitioner submitted nothing to corroborate several of its claims. For instance, the record contains no documentation of the beneficiary's claimed security clearance (or pending clearance) with Sandia National Laboratories, nor any clear explanation of why the beneficiary would need such a security clearance to survey the future building site of a privately owned factory outside the United States. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Regl. Commr. 1972)).

The petitioner's initial submission included background information about increasing business cooperation between the United States and Russia, and describing a proposed project in which ZAO Numotech-Spektr would manufacture medical devices, such as wheelchair cushions and a portable oxygen generator, using technology developed at Sandia National Laboratories. These background materials discuss financing for the construction of manufacturing facilities, but not technical aspects of the construction itself.

On June 5, 2009, the director instructed the petitioner to submit further evidence to establish the national scope of the beneficiary's intended occupation, and to show how the beneficiary's impact and influence in her field make it a matter of national interest to waive the job offer requirement. In response, counsel stated that the beneficiary "has influenced this field by working in the University and participating in the Scientific Counsel [*sic*]. . . . A person who is appointed Senior Teacher shows that she has demonstratable [*sic*] achievement." Clearly the beneficiary rose to a high rank during her long career, but rank itself is not influence. By the same token, serving on a council may provide the opportunity to have greater impact and influence on one's field, but that service is not, itself, proof of that influence. The petitioner did not explain why it is in the national interest that this beneficiary, specifically, be the geodesist in charge of the planned site of the ZAO Numotech-Spektr plant.

The petitioner submitted a second letter, dated July 10, 2009, from [redacted] which partly repeated his earlier letter. [redacted] discussed the ZAO Numotech-Spektr joint venture at length. The AAO need not discuss the petitioner's specific claims about the economic benefits that may result from this enterprise. Even if the petitioner were to establish the overall importance of that joint venture beyond dispute, it does not follow that involvement with the project, warrants a national interest waiver. [redacted] never claimed that the beneficiary's expertise lies in international relations or in the manufacture of medical equipment (which is the purpose of the joint venture). Rather, [redacted] made it clear that the beneficiary's role in the project concerns evaluating the proposed construction site for ZAO Numotech-Spektr's plant. [redacted] did not explain how the beneficiary's involvement in this very preliminary phase of the project has any more national scope than the purchase of building materials or the installation of ventilation systems would have at later steps in the process.

The director denied the petition on January 5, 2010, acknowledging the intrinsic merit of the beneficiary's occupation, but finding that the petitioner had not shown the national scope of the beneficiary's work or demonstrated that her intended work would serve the national interest to an extent that would justify a waiver of the job offer requirement that normally applies to the classification sought. On appeal, the petitioner submits two witness letters. Counsel states: "Both letters state all the

reasons why they feel that [the waiver] is in the U.S. government interest. The current cases also state that if the government specifically requests a certain candidate who has 'exceptional talent' th[e]n that alone would as well suffice."

[redacted] and a physician at Walter Reed Army Institute of Research, stated:

> Walter Reed Army Institute of Research (WRAIR) is interested in gaining access to the portable oxygen generators technology similar to those manufactured at [the petitioner's] joint venture medical device manufacturing facility in Russia.
>
> . . . WRAIR invents global medical solutions for the future, and keeps the warfighter on point for the Nation. . . . During her visit to the US, [the beneficiary] will be visiting our facility to discuss this new technology.

Although counsel claims that both of the witnesses on appeal "state why others qualifications will not suffice in this project," [redacted] does not mention the beneficiary's qualifications at all. From the contents of the letter, it is not clear that [redacted] knows that the beneficiary is a geodesist. [redacted] does not mention surveying, geodesy, or the need for familiarity with local soil conditions. He refers to the beneficiary with the title "Dr.," although there is no evidence she holds a doctorate. He praises "[t]he portable Oxygen Generator developed by this group and Sandia National Laboratories," but does not explain the beneficiary's role, if any, in developing that technology. The present-tense reference to goods "manufactured at [the petitioner's] joint venture medical device manufacturing facility in Russia" implies that [redacted] believes the plant to be fully built and already in operation. [redacted] looks "forward to meeting [the beneficiary] . . . to discuss future collaboration," but does not explain what sort of collaboration WRAIR would undertake with a geodesist or surveyor.

WRAIR's interest in portable medical equipment is obvious and understandable, but, for the reasons discussed above, [redacted] letter contains nothing of value to support the present petition.

Gerson S. Sher, president of United States Industry Coalition (USIC) states:

> USIC is a nonprofit association of high tech businesses, associations, and research institutions who are actively engaged in technology commercialization in the service of global security, peace and prosperity. For over fourteen years, USIC has facilitated projects for U.S. companies through the U.S. Department of Energy's (DOE's) Global Initiatives for Proliferation Prevention (GIPP) program. . . .
>
> The GIPP program not only serves the National interest in that it reduces the risk of proliferation of WMD through scientific engagement, but it also provides jobs in both the US and Russia as well as an outlet for the sale of US technology abroad.

The key issue in this proceeding is not the merit of GIPP, or nonproliferation, or international commercial cooperation. The key issue is whether the beneficiary's intended work for the petitioner warrants a national interest waiver. To establish this, it cannot suffice for the petitioner or third parties to discuss the overall significance of the ZAO Numotech-Spektr joint venture. The petitioner must establish the importance of the beneficiary's individual contribution to the project, and show why it is in the national interest for the beneficiary, rather than another qualified worker in the same field, to be the one making that contribution. With regard to the beneficiary's specific work, [redacted]tated:

> [The beneficiary] possesses unique knowledge in her area of expertise. Establishing [the beneficiary's] permanent resident status in the United States in an expedited fashion is absolutely essential for the success of the above-described project and is in the National Interest of this country. Her familiarity with the specific soil conditions in Snezhinsk is vital to the ability to build a manufacturing facility in that area. . . .
>
> [The petitioner] must have someone on its staff that is thoroughly familiar with geodesist engineering practices in Russia. She will setup and supervise the geodesist systems of both companies and establish company engineering procedures. [The beneficiary] must be able to travel freely between the two countries. She has received security clearances from the governments of both Russia and the United States. [The beneficiary] is in the process of obtaining security clearance by the US government to enter high security areas such as Sandia National Laboratories and similar defense research establishments. . . .
>
> Please note that [the petitioner] has already made a bona fide effort to hire an American geodesist. It proved to be absolutely impossible to find a qualified American geodesist for this position. . . . Because [the petitioner] cannot find anyone in the United States with the required expertise, there is no need for the protracted labor certification process.

The last sentence quoted above has it backwards. [redacted] claims that, because no qualified United States worker is available, "there is no need for . . . labor certification." The argument, in essence, is that the beneficiary is so likely to receive an approved labor certification that it would be a waste of time to go through the formal process. The labor certification process, however, is the very means by which a United States employer demonstrates that qualified United States workers are not available.

Furthermore, the assertion that no qualified United States geodesist is available for the project ignores the issue of whether a qualified Russian geodesist is available for a construction project in Russia. The petitioner has not explained the need for frequent travel to the United States, or why a nonimmigrant visa would not be sufficient for such travel. The petitioner has never explained why the beneficiary would require permanent residency in the United States in order to participate in a short-term project outside the United States in a country where the beneficiary already resides.

In terms of national scope, the beneficiary's duties, as described, involve the study of unique and site-specific local geographical and topographical characteristics, which would influence the design and

construction of the plant. By its very nature, such work is inevitably local rather than national in scope, because the beneficiary's analysis of the site would not be applicable anywhere else; the work is, by design, customized to that one particular site. The nature of the business that other people will, later, conduct on that site is irrelevant. The petitioner did not explain how the beneficiary's work would be any different if, instead of a medical equipment plant, the site would hold a hospital, hotel, or tire factory.

For the reasons discussed above, the AAO agrees with the director's finding that the petitioner has not shown the beneficiary's intended work to be national in scope, or demonstrated that it is in the national interest to grant the beneficiary permanent immigration benefits in order to participate in a Russian construction project.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.